IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

ST.Rev..No. 22 of 2004

TA.No.1252/1999 OF SALES TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH, ERNAKULAM (ORDER DATED 19-3-2003)

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REVISION PETITIONER/APPELLANT IN T.A./ASSESSEE:

M/S.KOCHI REFINERIES LIMITED,
AMBALAMUGAL 682 302,
REPRESENTED BY ITS SENIOR MANAGER (F & A) MR.N.VIJAYAGOPAL.

BY ADV. SRI.ANIL.D.NAIR
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR
SMT.PRIYA MAHESH
SMT.PRIYA MANJOORAN

RESPONDENT: RESPONDENT/RESPONDENT IN T.A:

STATE OF KERALA.

BY SENIOR GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 18/12/2007, ALONG WITH STRV NO. 44 OF 2004 STRV NO. 56 OF 2004 STRV NO. 58 OF 2004, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & K.M.JOSEPH, J.

S.T.Rev.Nos.22, 56, 58 and 44 of 2004

Dated, this the 18th day of December, 2007

ORDER

K.M.Joseph, J.

These revisions are directed against the common order passed by the Kerala Sales Tax Appellate Tribunal, Ernakulam in T.A.Nos.1252 and 1253 of 1999, 926 of 2000 and 409 of 2002. The assessment years in question are 1989-90, 1990-91, 1993-94 and 1995-96.

2. The assessee is an oil company registered under the provisions of the Kerala General Sales Tax Act, 1963 ('the Act' for short). The petitioner sold its products to oil marketing companies. The said companies pay the excise duty upon the products being cleared from the bonded warehouses.

3. The essential question that falls for our consideration is whether the excise duty paid by the purchasers of the products from the petitioner is liable to be included in the turnover of the petitioner company for the purpose of paying the turnover tax under Section 5(2A) of the Act.

4. The assessments were completed on the basis that the petitioner is liable to include the excise duty paid by the purchasers from the petitioner in the turnover of the petitioner. The said view came to be confirmed by the first appellate authority. The petitioner carried the matter in second appeal before the Tribunal. The tribunal by its common order has held against the petitioner. In arriving at the said conclusion the Tribunal placed reliance on the decision of this Court in *Mc Dowel and Company* v. *State of Kerala* (1997 5 KTR 325). The Tribunal took the view that the excise duty is always a duty payable by the manufacturer of an article and it remains the liability of the

manufacturer and further that although such liability of the manufacturer is discharged by someone else, the discharge is on account of the manufacturer. Therefore, the excise duty payment made by the purchaser will form part of the sales turnover of the manufacturer. In support of the same the tribunal has also placed reliance on the decision of the apex Court in *Mohan Breweries and Distilleries Limited* v. *Commercial Tax Officer* (107 STC 212) wherein the apex Court held that the primary obligation to pay excise duty is on the manufacturer and that the fact that excise duty does not physically enter the manufacturer till is not decisive for determining whether excise duty forms part of the manufacturer's turnover.

5. The petitioner has raised the following questions of law in these revisions:

> "i) In the facts and circumstances of the case ought not the tribunal have held that the excise duty paid by the oil marketing companies do not form part of the turnover of the Petitioner for the purpose of levy of turnover tax.
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> ii) Whether the appellate Tribunal was right in law and on facts in holding that the excise duty paid by the oil marketing companies will form part of the sales turnover of the Petitioner for the purposes of levy of turnover tax more so when the price at which the Petitioner sells goods to the oil marketing company and the price at which the oil marketing company sells the goods and discharges the duty liability (The ex-storage point ceiling selling price) are different.
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> iii) in the facts and circumstances of the case ought not the tribunal have held that the levy of additional sales tax, surcharge and turnover tax on goods coming under the Second Schedule is bad in law"

6. We heard the learned counsel for the petitioner and the learned Government Pleader. Mr.Anil D.Nair contends before us that the excise duty is paid by the purchasers from the petitioner. He would contend that having

regard to the provisions contained in Rule 157 of the Central Excise Rules and having regard to the fact that the sale has taken place pursuant to which the person with whom there is a contract for sale have become the owners of the goods, the primary liability to pay excise duty is on the purchasers from the petitioner. He would further refer to Rule 160 to contend that it was only in the event of the purchasers of the goods not paying the duty that there is a duty cast on the petitioner as manufacturer to pay excise duty. He would therefore contend that so far as the turnover tax is concerned, the law does not permit inclusion of the duty of excise which has been paid by the purchasers from the petitioner after release of the goods pursuant to the sale effected by the petitioner. It is an excise duty paid by the purchasers in their own account. It does not form part of the turnover of the petitioner and therefore, the petitioner is not liable to pay tax on the said element as part of the turnover, he contends.

7. Per contra, learned Government Pleader would submit that the order passed by the Tribunal is only to be sustained having regard to the case law which has been referred to by it and the reasoning adopted by it.

8. We would think that the questions pressed before us by the petitioner cannot be said to be res integra. The matter has engaged the attention of the highest court. We would notice that the Court had occasion to consider this question in the decision reported in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Ernakulam vs. M/s.Hindustan Petroleum Corporation* Vs. *State of Kerala* [(1997) 5 KTR 40]. Therein also the Court was considering the question as to whether the duty of excise is to be included in the turnover of the manufacturer. The Court proceeded to hold as follows:

> "On revision, the High Court held that excise duty is a duty on production of manufacture of goods which can be imposed at any convenient stage when the petitioner paid the excise duty, it merely discharged the obligation attached to the goods on production and this obligation being primarily that of the producer, the liability discharged was that of the producer. The excise duty paid by the petitioner was in discharge of the liability of CRL and would form part of the purchase turnover of the petitioner for the purpose of Section 5A of the Kerala General Sales Tax Act, 1963.
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> Affirming the Full Bench decision of the Kerala High Court in Hindustan Petroleum Corporation Ltd. Vs. State of Kerala, reported in 89 STC 106 = (1994) 2 KTR 108 (Ker), the Court held that the liability to pay excise duty is on the manufacturer. When the assessee paid excise duty, the obligation discharged was the obligation which had come in to being on the production of petroleum products and this obligation was primarily that of the producer and hence the petitioner discharged the liability of that producer. It is well settled that excise duty is a duty on the production of manufacture of goods. This duty can be imposed at any convenient stage provided it retains its character as excise duty. It would be difficult to accept the contention that the liability to pay excise duty is joint and several on the manufacturer as well as the purchaser or licensee of the warehouse as it runs against the well settled law that the duty of excise falls on the production or manufacture of goods. If the excise duty is payable by the manufacturer though not collected when the sale is made, the obligation is that of the manufacturer and if any other person discharges that obligation, that person discharges it on behalf of the manufacturer and therefore the excise duty paid by the purchaser is to meet the liability of the manufacturer. The High Court was, therefore, right in concluding that the liability is cast on the manufacture alone. The liability is not joint and several so far as the manufacturer and purchaser are concerned".

9. We further notice that the apex Court had occasion to consider this question in the case reported in *Mohan Breweries & Distilleries Ltd. v. Commercial Tax Officer, Madras and others* [(1997) 107 STC 212]. There, the question for decision was whether the excise duty on potable liquor manufactured by the appellants, paid by the purchasers thereof, is includable in

the taxable turnover of the appellants for the purpose of levy of tax under the Tamil Nadu State General Sales Tax Act. In the course of the judgment after elaborate consideration of the case law, the court proceeded to hold as follows:

> "As we look at it, the primary obligation to pay excise duty on the IMFL is of the manufacturer thereof. Rule 22 only provides for a convenient method for its collection. When the excise duty is collected from a party removing the IMFL from the factory of its production, other than the manufacturer, the payment of excise duty that that party makes is in discharge of the obligation of the manufacturer. That party does not, as it would ordinarily do, pay the excise duty component along with the sale price of the IMFL it purchases to the manufacturer; it pays the sale price to the manufacturer and it pays the excise duty into the treasury for and on behalf of the manufacturer. In effect, therefore, the element of excise duty does enter into the turnover of the manufacturer just as much as it would ordinarily do. The definition of "turnover" in section 2(r) of the Sales Tax Act, referring as it does to "the aggregate amount for which goods are brought or sold" and "whether for cash or ..... other valuable consideration", is wide enough to cover such excise duty. That the excise duty does not physically enter the manufacturer's till is, as held in the second *Mc Dowell* case [1985] 59 STC 277 (SC), not the decisive test for determining whether or not it would be a part of the manufacturer's turnover".

10. The apex Court further considered the question in the decision reported in *State of Kerala* v. *Maharashtra Distilleries Limited* [(2005)141 STC 358]. There, the court considered the question in the following set of facts. Turnover tax was levied on manufacturers/distillers of alcohol. The Kerala State Beverages Corporation, a government company, was granted the exclusive monopoly for the wholesale trade of Indian Made Foreign Liquor. The question arose whether the excise duty which is paid by the Kerala State Beverages Corporation was liable to be included in the turnover of the manufacturer/distiller. The apex Court considered the whole issue and inter alia, held as follows:

> "77. From the above discussions the following conclusions emerge:
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> xx xx xx
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> (3) In order that a duty may be characterised as "duty of excise" it must be shown that it is a duty on manufacture of goods. If it is unrelated to the manufacture of goods, it may be any other impost permitted by law, but would not qualify as a duty of excise.
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> Xx xx xx
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> (6) The levy of duty on IMFL issued from a bonded warehouse licensed or established under section 12 or section 14 of the Act is referable to the duty levied under section 17(f) of the Kerala Abkari Act.
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> (7) The notifications issued by the Government relate both to goods manufactured in the area or imported into the area.
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> (8) The duty levied is on goods and not on manufacture".

11. We would take note of the fact that as far as the said decision is concerned, considering the entire facts and circumstances, what the court held was that duty of excise which is levied under the Abkari Act is not a duty on manufacture of liquor, but a duty paid essentially as consideration for parting of the privilege by the Government under the Abkari Act. As far as the facts of this case is concerned, there is no dispute that what is involved is a duty imposed on account of manufacture of the goods in question and therefore, it is a duty of excise levied on manufacture. As far as the duty of excise levied on the basis of it being a duty on manufacture is concerned, the duty may be collected from the manufacturer or it may be collected from any person at a later stage. In this case the fact that the duty of excise is collected from the

purchasers upon their clearing the products from the bonded warehouses would not detract from the fact that it is a duty which is payable essentially by the petitioner assessee.

12. In this view of the matter, we would think that the view taken by the Tribunal is beyond reproach and only to be upheld. We therefore, answer the questions of law framed by the assessee against the assessee and in favour of the Revenue and dismiss the revision petitions.

Ordered accordingly.

(**H.L.DATTU)**
CHIEF JUSTICE

(K.M.JOSEPH)
JUDGE

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